IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 341 OF 2005

Rajaram T. Choudhary & Ors. ..Appellants

versus

Subhash B. Muttha ..Respondent

Mr. P. B. Shah for the Appellants.

Mr. P. K. Dhakephalkar for the Respondent.

CORAM : D. G. DESHPANDE,J.

DATE : 31ST AUGUST,2005

P.C. :

1. Heard Counsel for the appellants and the respondent.

2. Appellants were the original defendants. The suit came to be filed against them for specific performance on the basis of Agreement dated 8.6.1994. The suit was filed in 1995. It came to be decreed in 2004. For 9 long years no written statement was filed on behalf of the appellants - defendants and therefore the court accepting the case of the plaintiff, decreed the suit. Hence this appeal.

3. Counsel for the appellants contended that written statement was prepared by the Advocate for the appellants in 2001, the signature of the appellants was obtained. Copy of the written statement for being served upon the plaintiff was also kept ready but the advocate did not file it on record. According to him the appellants as litigants are not at fault and therefore for the mistake or lapses on the part of the advocate the litigant should not suffer.

4. He also contended that as per the agreement, 70% of the agreement amount of consideration was to be paid by the original plaintiff before 5.8.1994. That was not paid. Therefore there was breach on the part of the plaintiff and on that count also he also cannot get relief.

5. When the matter had appeared before me earlier and I heard both the sides suggestion was made by me for amicable settlement. It was suggested to Mr. Dhakephalkar looking long lapse of time between the date of the agreement and date of decree, his client - the plaintiff should be ready to pay something more to the defendants - appellants. Mr. Dhakephalkar on the basis of the instructions from his client, today, informed that his client is ready to pay Rs.3 lacs more to the

appellants. But Mr. Shah appearing for the appellants declined that offer and insisted that the matter be decided on merits.

6. Mr. Shah also relied upon two judgments of this court reported in **2003 (3) Mh.L.J. 1003 Ashok Ravji Vadodriya vs. Municipal Corporation of Greater Bombay,** and also judgment of the Supreme Court reported in **AIR 1984 Supreme Court 41 Smt. Lachi Tewari and ors. vs. Director of Land Records and ors.**

7. In the matter before the Supreme Court what appears from the facts is that the petitioner before the Supreme Court had taken extra care to engage three Advocates and the court found that nothing more to be expected of him and that he had also taken steps to file an early application to avoid being thrown out unheard.

8. In the matter before the Bombay High Court there was some error or lapse on the part of the lawyer’s clerk and to some extent of the Advocate in noting the dates. Both the cases are not applicable to the facts of the present case.

9. Admittedly the appellants and their lawyer hail from the same place. If the appellants were served with the writ of summons or summons of the

suit and they had engaged an advocate, they should have been diligent in prosecuting their cause and pursuing his lawyer to be diligent. Even if the statement is correct that the written statement was ready and signed in 2001, there is absolutely no reason why he did not persuade his advocate to file it on record till the decree was passed. It is clear from the conduct of the appellant that he was totally negligent and reckless in prosecuting his cause, the explanation now sought to be given, is not at all acceptable. If the written statement was ready in 2001, passing of the decree in 2004 in his absence, clearly shows that not even on single day they appeared in the matter. The court was fully justified in proceeding exparte.

10. So far as other contention of Mr. Shah is concerned, about non payment of 70% of the agreed amount, there is no substance in the same because the suit for specific performance was filed immediately where the plaintiff had shown his willingness to perform his part of the agreement. The trial court has rightly observed that inspite of this agreement, the defendants - appellants had accepted further amount of consideration and has therefore waived their right. There is no merit in this appeal. The same is dismissed with costs. Prayer for statusquo is rejected as there is absolutely no substance or merit and the same is

dismissed at the admission stage itself.

31.8.2005 (D.G. DESHPANDE, J.)